88-1432

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

MARIA ESPARZA, et al.,

Petitioners,

v.

RUBEN VALDEZ, Executive Director,
Colorado Department of Labor, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February 24, 1989

QUESTIONS PRESENTED

1. Does the Eleventh Amendment bar a federal court from ordering the payment of "retroactive" unemployment benefits from an unemployment trust fund, in order to remedy past violations of federal law by State officials alleged to have systematically denied benefits to eligible aliens, in violation of the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(14)?

2. Should *Hans v. Louisiana*, 134 U.S. 1 (1890), and its progeny be overruled as having incorrectly decided that the States enjoy Eleventh Amendment immunity from suit in federal court for the violation of federal law?

LIST OF PARTIES

The parties before this Court and to the proceedings below are:

1. Petitioners Maria Esparza, Eudesimo Arteaga, Reyes Nunez-Ortega, Bahman Zanjani, Daniel Agonafer, Jose Sandoval, Kazimierez Kozak, and Consuelo Sandoval, on behalf of themselves and all others similarly situated.

2. Respondents Ruben Valdez, Executive Director, Colorado Department of Labor; John Kezer, Director, Division of Employment and Training; and the Industrial Commission of Colorado (Ex-Officio the Unemployment Compensation Commission). All respondents were named in their official capacities only. The current successors of the named respondents are: John J. Donlon, Executive Director, Colorado Department of Labor and Employment; and Robert Husson, Director, Division of Labor. By operation of Colo. Rev. Stat. § 8-1-102, the Industrial Commission of Colorado has been replaced by the Industrial Claim Appeals Panel.

The provision of Rule 28.1 concerning corporations is not applicable to this petition.

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Petitioners Maria Esparza, Eudesimo Arteaga, Reyes Nunez-Ortega, Bahman Zanjani, Daniel Agonafer, Jose Sandoval, Kazimierez Kozak, and Consuelo Sandoval, on behalf of themselves and all others similarly situated, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled proceeding on November 30, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 862 F.2d 788, and is reprinted in the appendix hereto at 1a.

The memorandum opinion and order, as amended, of the U.S. District Court for the District of Colorado is reported at 612 F.Supp. 241, and is reprinted in the appendix hereto at 19a.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), petitioners in June 1984 initiated this suit in the District of Colorado in order to obtain relief pursuant to 42 U.S.C. § 1983 against various Colorado state officials. After trial on a motion for preliminary relief, the district court on June 25, 1985, dismissed without prejudice all the claims of petitioners on jurisdictional grounds, namely, that they were required first to pursue "adjudicative processes" available before a "state administrative tribunal". 23a-24a.

On November 30, 1988, the Tenth Circuit entered a judgment affirming the order of dismissal by the district court, but on other grounds, namely, that the claims for prospective relief were moot and that the claims for retroactive relief to redress past violations of federal law were barred by the Eleventh Amendment. 13a, 18a. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the U.S. Constitution:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(14)(A):

> [C]ompensation shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act) . . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioners are eight individual aliens who were denied unemployment insurance benefits by Colorado state authorities. Each of the petitioners lawfully earned wages while residing in the United States and, on the basis of those wages, properly made claims for unemployment insurance benefits. In each instance, the respondent Colorado Department of Labor, Division of Employment and Training (Division), denied them unemployment insurance benefits because of their status as aliens, either outright upon initial application or by charging them with an overpayment for benefits previously paid.

Seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, including retroactive payment of benefits wrongfully withheld, petitioners initiated a class action suit in June 1984.[1] Specifically, petitioners' Complaint alleged that it was the practice and policy of the Division categorically to deny unemployment insurance benefits to all aliens, except for those applicants who possessed a permanent resident visa (also known as a "green card" or "alien registration card") during the

[1] Four of the petitioners, Maria Esparza, Eudesimo Arteaga, Reyes Nunez-Ortega, and Bahman Zanjani, initiated the suit. Five months later, on November 8, 1984, the district court entered an order joining three of the other petitioners, Daniel Agonafer, Jose Sandoval, and Kazimierez Kozak. The eighth petitioner, Consuelo Sandoval, filed a motion for joinder as a party plaintiff on June 24, 1985, but the motion was denied the following day in conjunction with the district court order dismissing the case. 24a.

"earnings" or "base period" utilized for determining monetary eligibility for benefits. That is, the Division would determine an alien eligible for benefits if "lawfully admitted for permanent residence", but as a practical matter would not do so for aliens who fit the other two categories under the Federal Unemployment Tax Act (FUTA) which afford eligibility to aliens "permanently residing under color of law" or "lawfully present for purposes of performing services". See, 26 U.S.C. § 3304(a)(14)(A).[2]

Petitioners also alleged that the respondent Industrial Commission of Colorado, the administrative tribunal within the Colorado Department of Labor which determined unemployment insurance appeals taken from the Division, did recognize that aliens were eligible under the aforementioned three categories, but in practice utilized

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[2] As a condition of participation in the unemployment insurance program, each state must adopt state laws which conform to the requirements of the Federal Unemployment Tax Act (FUTA) and Title III of the Social Security Act. See, 26 U.S.C. § 3304; 42 U.S.C. § 501 *et seq*. Colorado has incorporated the alien eligibility provisions of FUTA verbatim into the Colorado Employment Security Act, Colo. Rev. Stat. § 8-73-107(7), except for substitution of the word "compensation" for "benefits". 4a. See, *Industrial Commission v. Arteaga*, 735 P.2d 473, 477 (Colo. 1987). Colorado courts have consistently held that this conforming state law provision is to be interpreted to have the same meaning as the alien eligibility provisions of FUTA, 26 U.S.C. § 3304(a)(14)(A). See, e.g., *Arteaga, supra*, 735 P.2d at 476; *Sandoval v. Colorado Division of Employment*, 757 P.2d 1105, 1107 (Colo. App. 1988), cert. denied (Colo. S.Ct. October 17, 1988).

vague, inconsistent and ill-defined criteria in determining such claims.[3]

The district court deferred determination of class certification[4] and instead, on December 6, 1984, held an

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[3] In addition to claims under FUTA, petitioners alleged violations of the prompt payment "when due" requirements of the Social Security Act, 42 U.S.C. § 503(a)(1), and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution. Given that the Division recognized only one category of eligible aliens, and the Industrial Commission recognized all three categories but did so in an inconsistent manner, petitioners alleged that they were subjected to conflicting eligibility criteria and that their entitlements to benefits were determined in an arbitrary and capricious manner, in violation of their rights to due process and equal protection under the law.

In subsequent proceedings in state court where some of the petitioners had pursued judicial review of their individual administrative decisions denying benefits, the Colorado Supreme Court held that "the [Industrial C]ommission's rulings in these cases are not consistent." *Industrial Commission v. Arteaga*, 735 P.2d 473, 475 n.3 (Colo. 1987).

[4] On July 12, 1984, petitioners filed a motion for class certification supported with documentation from the Division that indicated that in Colorado approximately 70 aliens a month applied for unemployment benefits. Based upon that figure, petitioners estimated that approximately 4,620 aliens had applied for benefits between 1979 and the filing of suit. Motion and Memorandum in Support of Class Certification, filed July 12, 1984, at 4 and attached PX 26 and PX 27 (Division statistics regarding alien applicants for May and July 1983).

It is clear that the district court would have deemed relief on a class-wide basis appropriate had it not dismissed the case on jurisdictional grounds. See, 23a.

evidentiary hearing on petitioners' motion for a class-wide preliminary injunction. At the close of petitioners' case, respondents offered no significant evidence in rebuttal.

On June 25, 1985, the district court issued its memorandum opinion and order, construing only one part of FUTA, i.e., the provision pertaining to aliens "permanently residing under color of law" (PRUCOL). See amended judgment, entered July 5, 1985. 25a-26a.

At the same time, the district court denied relief and dismissed the Complaint without prejudice, essentially on jurisdictional grounds. Apparently the view of the district court was that the character of the petitioners' individual claims somehow precluded class representation, 6a, and that while petitioners presented a justiciable "case or controversy", the district court simply lacked the power to adjudicate such claims. Therefore, petitioners instead would have to pursue relief through "adjudicative processes" available before a "state administrative tribunal". 23a.

On appeal to the Tenth Circuit, petitioners contended that the district court had improperly dismissed the case on jurisdictional grounds, misconstrued the PRUCOL provision of FUTA, erred by failing to consider their other statutory and constitutional claims, erred in not certifying a class, and improperly denied them attorney fees and costs under 42 U.S.C. § 1988.

While this action was being prosecuted in federal court, three of the petitioners pursued individual appeals of the administrative denial of benefits in the Colorado state courts. Ultimately, the Colorado Supreme Court

ruled in favor of all three petitioners, finding them PRUCOL eligible within the meaning of FUTA. See, *Industrial Commission v. Arteaga*, 735 P.2d 473 (Colo. 1987); *Division of Employment and Training v. Turynski*, 735 P.2d 469 (Colo. 1987). Subsequently, two other petitioners were granted relief by respondents because of state administrative appeals they had pending at the time the *Arteaga* and *Turynski* decisions were announced. 6a.

As a result of these parallel proceedings in the Colorado state court system, several months after appellate oral argument the Tenth Circuit issued an order to show cause why the appeal should not be dismissed as moot because of the preclusive effect of these recent Colorado Supreme Court decisions. The parties and an amicus curiae took varying positions. Petitioners contended that the case was not moot because some of the named plaintiffs had not yet obtained relief, that those who had obtained relief could still act as class representatives, and that no preclusive effect could be given to either the Colorado Supreme Court decisions or the unreviewed state administrative decisions affecting various petitioners.[5]

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[5] By operation of the Full Faith and Credit statute, 28 U.S.C. § 1738, state law determines what preclusive effect, if any, should be given to a state judgment in federal court. *Migra v. Warren City School District*, 465 U.S. 75, 81, 104 S.Ct. 892, 896 (1984). Under Colorado common law preclusion principles, no preclusive effect can be given to an unemployment insurance decision in a subsequent civil rights action pursuant to 42 U.S.C. § 1983. *Salida School District v. Morrison*, 732 P.2d 1160, 1164-65 (Colo. 1987). Essentially the same result is dictated by recent amendments to the Colorado Employment Security Act. *Salida School District, supra*, 732 P.2d at 1164 n.2. See, Colo. Rev. Stat. § 8-74-108.

The Tenth Circuit never addressed the concerns about claim and issue preclusion that it posed in its order to show cause. Instead, it determined that the claims for prospective relief were moot, given the favorable rulings obtained by some of the petitioners in the parallel state court proceedings:

> At most, plaintiffs in the present case seek a declaration that an otherwise eligible alien claimant qualifies under PRUCOL whenever the INS knows of the alien's presence in the United States and, by either action or inaction, has acquiesced in his continued presence. We believe the Colorado decisions have adopted such an interpretation; at least they clearly have adopted a standard that would provide relief to many more of the individual and class plaintiffs than under the district court's standard.

See, 9a. The Tenth Circuit concluded that, in any event, recent changes in immigration law and agency directives from the U.S. Department of Labor to state unemployment programs had rendered the need for prospective relief moot. 11a-13a.

The Tenth Circuit determined, however, that the claims of some of the petitioners and the putative class for retroactive relief were not moot because they chose not to appeal in the state courts and, therefore, had not reaped the benefits of the *Arteaga* and *Turynski* decisions, *supra*.[6] 13a. Nevertheless, the Tenth Circuit held that petitioners could not obtain retroactive relief in federal court

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[6] Respondents conceded before the Tenth Circuit that petitioners Daniel Agonafer and Consuelo Sandoval "have apparently not received relief from either the state courts or the

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in order to obtain past unemployment benefits wrongfully withheld. 18a.

Even though the respondent state officials never raised it as a defense before the district court or the court of appeals, the Tenth Circuit, *sua sponte*, and without the benefit of briefing on the issue, proceeded to determine if the Eleventh Amendment bars any claim asserted.

The Tenth Circuit concluded that the Eleventh Amendment bars any claim for retroactive relief in this case. It acknowledged that the Fourth Circuit, as well as

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Division of Employment and Training" and "that their circumstances are sufficiently similar to those of the other plaintiffs so that such relief should have been afforded." Respondents Memorandum Brief at 9, filed August 19, 1988. Respondents also stated to the Tenth Circuit that petitioner Jose Sandoval's overpayment of unemployment benefits had been "suspended", but respondents did not assert that recovery of his overpayment had been waived pursuant to state regulations. *Id.*, at 8.

Petitioner Consuelo Sandoval has formally requested leave to file a late appeal, and petitioners Daniel Agonafer and Jose Sandoval have formally requested waiver of recovery of their overpayments based upon the Colorado Supreme Court decision in *Arteaga, supra*. Letter dated February 17, 1989 to respondents' counsel Maryann Whiteside from petitioners' counsel Daniel M. Taubman.

Even if petitioners Jose Sandoval, Consuelo Sandoval and Daniel Agonafer are now afforded relief by respondents, this case will not be moot. Three unnamed class members, Oscar Rivas, Eliodoro Madera and Twumasi Ankrah, all of whom still seek retroactive unemployment benefits, have come forward and expressed their interest in serving as class representatives in the event retroactive relief is ultimately afforded to the class.

district courts in other circuits, "have allowed plaintiffs to sue a state in federal court for recovery of past unemployment claims, principally on the grounds that the state's unemployment compensation fund is a special, segregated fund as distinguished from a general revenue fund." 15a. See, e.g., *Brown v. Porcher*, 660 F.2d 1001, 1007 (4th Cir. 1981), cert. denied, 459 U.S. 1150, 103 S.Ct. 796 (1983), overruled on other grounds, *Wimberly v. Labor & Industrial Relations Commission*, 479 U.S. 511, 107 S.Ct. 821 (1987).

The Tenth Circuit rejected the notion that any legal significance for the purpose of the Eleventh Amendment could be attached to the fact that an unemployment trust fund is "segregated" in nature, that such a fund derives from separately financed "employer contributions, federal funding, investment income, and other receipts", or that "the state was insulated from liability for amounts exceeding the resources of the fund." 15a-17a.

The Tenth Circuit further held that, ultimately, it would not matter "even if we could find little or no fiscal impact on the state from plaintiffs' suit", because "no matter what fund a judgment for past damages comes from, it is still a damage award against the state." 18a.

Although adopting a different rationale than the district court, the Tenth Circuit on the foregoing jurisdictional bases affirmed the dismissal of all the claims of petitioners. 18a.

REASONS FOR GRANTING THE WRIT

I

The Tenth Circuit holding that the Eleventh Amendment bars a federal court from ordering payment of "retroactive" unemployment insurance benefits from an unemployment trust fund is in conflict with the law of the Third, Fourth, Fifth, Seventh and Ninth Circuits.

The Tenth Circuit decision in this case is in direct conflict with the law of the Fourth Circuit which has held that the Eleventh Amendment is not a bar to retroactive relief derived from an unemployment trust fund. See, *Brown v. Porcher, supra,* 660 F.2d at 1007. The holding by the Tenth Circuit also conflicts with the holdings of the Third, Fifth, Seventh and Ninth Circuits that similar specialized funds, insular in character and segregated or immunized from the general revenues of the state, are subject to federal court orders of retroactive relief. See, *infra.*

Four and a half years after bringing suit, in a case in which the respondent Colorado state officials neither in their Answers nor at any other juncture in proceedings before the district court or the court of appeals raised the Eleventh Amendment as a defense, the Tenth Circuit, *sua sponte,* has determined that the named petitioners and the class they represent are effectively barred from obtaining relief for past violations of federal law. The Tenth Circuit has cloaked those same state officials with immunity under the Eleventh Amendment, even though they are alleged to have systematically denied the petitioners unemployment insurance benefits for no reason other than their being aliens, and even though federal law expressly affords them eligibility. See, 26 U.S.C. § 3304(a)(14)(A).

Three of the individual petitioners and the entire class of thousands of potentially eligible aliens they represent are now without any effective remedy either in federal or state court to redress the past violation of their rights under federal law. This harsh result has occurred even though the district court, in the same breath with which it improperly dismissed the petitioners' claims, conceded that if petitioners were correct about the meaning of the PRUCOL phrase, "then all of the plaintiffs and the class they represent would come within it, and injunctive relief should be granted." 23a. The Tenth Circuit recognized as much, given that the petitioners' interpretation of the PRUCOL phrase has essentially prevailed in individual cases in the Colorado state court system. 6a, 8a-11a.

The federal rights under FUTA of thousands of potentially eligible aliens residing in Colorado were violated, at least between the time that 26 U.S.C. § 3304(a)(14)(A) was enacted in 1976, and the 1985 decisional date by the Colorado Court of Appeals in *Arteaga*, the first Colorado state decision to uphold the PRUCOL standard advanced by petitioners. See, *Arteaga v. Industrial Commission*, 703 P.2d 654 (Colo. App. 1985), aff'd, 735 P.2d 473 (Colo. 1987). The Colorado state courts have embraced an interpretation of PRUCOL directly based upon federal law, and virtually identical to that adopted by the overwhelming majority of jurisdictions which have interpreted that phrase.[7] See, *Arteaga, supra*, 735 P.2d at

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[7] The Colorado Supreme Court has adopted the definition of PRUCOL first established in the seminal holding of the Second Circuit in *Holley v. Lavine*, 553 F.2d 845, 849-50 (2d Cir. 1977). See, *Arteaga, supra*, 735 P.2d at 478. Upon invitation by this Court, the Solicitor General of the United States expressed

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479; *Sandoval v. Colorado Division of Employment*, 757 P.2d 1105, 1107 (Colo. App. 1988), cert. denied (Colo. S.Ct. October 17, 1988).

Yet three of the named petitioners and thousands of unidentified class members have nowhere to go to vindicate those rights. By erecting an Eleventh Amendment jurisdictional bar not relied upon by the respondent state officials, the Tenth Circuit has precluded any federal court remedy for those individual petitioners and the putative class members, however meritorious their claims.[8] Because the statute of limitations has run, peti-

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the view that the decision in *Holley* was correctly decided and recommended that certiorari not be granted. See, No. 77-318, Memorandum for the United States as Amicus Curiae. This Court declined to review the *Holley* decision. *Id.*, cert. denied, 435 U.S. 947, 98 S.Ct. 1532 (1978).

The Colorado Supreme Court decision in *Arteaga* is representative of similar holdings by the overwhelming majority of jurisdictions which have interpreted the PRUCOL phrase. See, e.g., cases cited in *Arteaga*, 735 P.2d at 479. See also, *Berger v. Heckler*, 771 F.2d 1556 (2d Cir. 1985).

[8] For purpose of the questions presented by this petition, it is irrelevant that the petitioners are aliens. To be sure, the Eleventh Amendment by its terms would appear to prohibit "Citizens or Subjects of any Foreign State" from bringing suit against a state. However, this Court has determined that *any* person, including aliens, with a claim arising under 42 U.S.C. § 1983 can proceed in federal court against a state defendant in order to obtain "prospective" relief, at least in order to remedy a continuing violation of federal law. *Edelman v. Jordan*, 415 U.S. 651, 664, 94 S.Ct. 1347, 1356 (1974); *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423 (1985).

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tioners are barred from bringing their individual or class claims under § 1983 in state court.[9]

This result is in direct conflict with the Fourth Circuit, which has held that the Eleventh Amendment is not a bar to a federal court order which requires state officials to pay retroactive benefits from an unemployment insurance trust fund. See, *Brown v. Porcher, supra,* 660 F.2d at 1007. Several district courts have come to the same conclusion. See, e.g., *Bowen v. Hackett,* 387 F.Supp. 1212, 1220-23 (D.R.I. 1975); *New York Telephone Co. v. New York State Dept. of Labor,* 434 F.Supp. 810, 824 (S.D.N.Y. 1977), rev'd on other grounds, 566 F.2d 388 (2d Cir. 1977), aff'd, 440 U.S. 519, 99 S.Ct. 1328 (1979); *Kostelic v. Bernardi,* 538 F.Supp. 620, 622 (N.D.Ill. 1982).

By implication, the Seventh Circuit has reached essentially the same result. See, *Jenkins v. Bowling,* 691 F.2d 1225, 1235 (7th Cir. 1982), vacating judgment but not disturbing unappealed order of relief in No. 80-C-928

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Further, regardless whether one is a citizen or non-citizen for the purpose of the Eleventh Amendment, "retroactive" relief is only barred if the judgment would derive "inevitably from the general revenues of the State". See, *Edelman, supra,* 415 U.S. at 665, 94 S.Ct. at 1357.

Of course, that is precisely the issue posed by this case. If the relief would not derive from such a source, then the Eleventh Amendment is inapplicable, regardless whether petitioners are aliens.

[9] The applicable Colorado statute of limitations for a § 1983 action is two years. Colo. Rev. Stat. § 13-80-102. See, *Owens v. Okure,* No. 87-56, Slip Opinion (January 10, 1989).

(N.D.Ill. January 28, 1982) (Grady, J.) (ordering retroactive payment of unemployment benefits over Eleventh Amendment objection).

Distinguishing this Court's holding in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347 (1974), no less than five courts of appeals – the Third, Fourth, Fifth, Seventh and Ninth Circuits – have in other contexts held that the Eleventh Amendment is not a bar to retroactive relief which would derive from similar specialized "state" funds which are separate, insular, segregated or immunized from the general revenues of the state.

For example, the Third Circuit has held that the Eleventh Amendment does not necessarily bar a damages award against the Pennsylvania state public school retirement board. Such is the case if the award would derive not from the state treasury but rather from some other, distinct source which is "segregated" or "set apart", over which the state serves only a "ministerial" rather than "proprietary" role, which is not subject to "attachment" for the defaults of the state's general payment obligations, or for which the state is itself immunized from liability in the event the fund cannot meet its obligations. *Blake v. Kline*, 612 F.2d 718, 721-26 (3d Cir. 1979), cert. denied, 447 U.S. 921, 100 S.Ct. 3011 (1980). Similarly, affirming an order which required the repayment of employee and employer contributions from the North Carolina state retirement system, 612 F.Supp. 223 (E.D.N.C. 1985), the Fourth Circuit has rejected the contention that such an order offends the Eleventh Amendment. *Almond v. Boyles*, 792 F.2d 451, 456 (4th Cir. 1986), cert. denied, 479 U.S. 1091, 107 S.Ct. 1302 (1987).

See also, *Schiff v. Williams*, 519 F.2d 257, 262 (5th Cir. 1975) (*Edelman* does not bar payment of back pay award from fund composed of student activity fees which would have "no true impact on the state treasury"); *Miller-Davis Co. v. Illinois State Toll Highway Authority*, 567 F.2d 323, 327 (7th Cir. 1977) (Eleventh Amendment does not bar damages award from Illinois state highway fund, a special account held by state treasurer segregated from general public funds of the state which were not liable for the obligations of the highway fund, and any award from which would only have ancillary effect on the general funds of the state); *Hutchison v. Lake Oswego School District*, 519 F.2d 961, 966-67 (9th Cir. 1975) (damages award against Oregon school board or school district not barred by Eleventh Amendment where agency is autonomous in character and state treasury is insulated from judgment).

The Tenth Circuit in this case has expressly rejected the factual and legal differences which at least five other circuits, *supra*, have determined may subject a specialized fund, like an unemployment trust fund, to a retroactive damages award for past violations of federal law. See, 15a-18a.

The holding of the Tenth Circuit is problematic on several counts. The Tenth Circuit has fundamentally misunderstood the nature of an "unemployment trust fund". Further, in contrast to the rule in other circuits, the Tenth Circuit did not undertake a fact-specific inquiry into the exact nature of the retroactive relief, and at a minimum should have remanded this case to the district court for that purpose. See, e.g., *Blake v. Kline*, *supra*. Instead, the Tenth Circuit apparently holds the view that, ultimately,

it does not matter. The Tenth Circuit summarily concluded that "even if we could find little or no fiscal impact on the state from plaintiffs' suit", it would be of no consequence because "no matter what fund a judgment for past damages comes from, it is still a damage award against the state." 18a.

To the contrary, it does matter. If in fact an order of retroactive relief would not result in a monetary award satisfied out of the general revenues of the state or some other comparable source, such an order is not barred by the Eleventh Amendment. An award of retroactive unemployment benefits payable from the Colorado unemployment trust fund would *not* constitute an award against the state of Colorado for which its state treasury or general revenues ultimately would be liable.[10]

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[10] Under Colorado law, the state treasurer is custodian of a "special fund administered by the Division of Employment exclusively for purposes of Article 70 to 82 of this Title", i.e., the Colorado Employment Security Act. Colo. Rev. Stat. § 8-77-101(1). All taxes, payments in lieu of taxes, fines and penalties, interest, and "all other monies accruing to the fund from the federal government or any source whatsoever" are deposited in a clearing account by the state treasurer. Colo. Rev. Stat. § 8-77-102(1). Under Colo. Rev. Stat. § 8-77-102(3), the state treasurer deposits funds received under Colo. Rev. Stat. § 8-72-110(5) (funds paid by the Railroad Retirement Board or other U.S. agencies or by private non-profit organizations or political subdivisions of Colorado as contributions to the Employment Security fund), or interest on employer payroll taxes collected under Colo. Rev. Stat. § 8-79-101, into an unemployment reserve fund. All other amounts in the clearing account are paid to the Secretary of the U.S. Treasury, to the account of the state of Colorado. Colo. Rev. Stat. § 8-77-102(4).

(Continued on following page)

Six years ago, this Court declined to disturb the Fourth Circuit's interpretation of the Eleventh Amendment even though the issue was squarely presented. *Brown, supra*, 459 U.S. 1150, 103 S.Ct. 796 (1983). But see, 459 U.S. at 1153, 103 S.Ct. at 797-98 (White, J., dissenting).

(Continued from previous page)

Under Colo. Rev. Stat. § 8-77-104(1), unemployment benefits are paid from the Colorado account maintained by the U.S. Treasury. Furthermore, Colorado is not liable to pay benefits if the account is exhausted. Colo. Rev. Stat. § 8-77-104(5).

Under § 303 of the Social Security Act, 42 U.S.C. § 503(a)(4), all money received in the unemployment fund of a state must be immediately paid to the U.S. Secretary of the Treasury, "to the credit of the unemployment trust fund." Section 904 of the Social Security Act, which is referenced in the Colorado Employment Security Act, Colo. Rev. Stat. § 8-77-102(4), establishes in the U.S. Treasury a "trust fund". Under § 303(a)(5) of the Social Security Act, 42 U.S.C. § 503(a)(5), all money withdrawn from the unemployment fund of each state must be spent for the payment of unemployment compensation. The Federal Unemployment Tax Act also requires, as a condition of a state's employers' receiving credit against the federal unemployment tax, that all money received in a state's unemployment fund shall immediately be paid over to the Secretary of the U.S. Treasury, 26 U.S.C. § 3304(a)(3), and that all money withdrawn from these unemployment funds be "used solely in the payment of unemployment compensation", 26 U.S.C. § 3304(a)(4).

Thus, under both Colorado and federal law, the employer taxes collected by the state of Colorado are held in the U.S. Treasury and are available only for the payment of unemployment compensation benefits. The Tenth Circuit is legally and factually wrong to conclude that these funds are part of the Colorado state treasury or even to imply that the state of Colorado is liable for the benefits if the fund is depleted.

This Court has declined to disturb similar holdings in other contexts by the Third and Fourth Circuits, *Blake v. Kline* and *Almond v. Boyles, supra.*

The Court should hear the present case in order to resolve the conflict among the circuits created by the Tenth Circuit decision.

II

This Court should examine the important question whether *Hans v. Louisiana*, 134 U.S. 1 (1890), was incorrectly decided and should be overruled.

On four occasions in recent years, four members of this Court have urged that "it is time to begin a fresh examination of Eleventh Amendment jurisprudence without the weight of [the] mistaken precedent" of *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890). See, *Welch v. Texas Dept. of Highways*, ___ U.S. ___, ___, 107 S.Ct. 2941, 2958-70 (1987) (Brennan, Marshall, Blackmun and Stevens, dissenting); *Papasan v. Allain*, 478 U.S. 265, 292, 106 S.Ct. 2932, 2948 (1986) (same, dissenting in relevant part); *Green v. Mansour*, 474 U.S. 64, 74, 106 S.Ct. 423, 429 (1985) (same); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247, 105 S.Ct. 3142, 3150 (1985) (same).

The Tenth Circuit decision in this case epitomizes what has gone wrong with, and the inherent injustices which directly flow from, the "expansion" of the "egregiously incorrect" decisions in *Edelman v. Jordan, supra*, and its progenitor, *Hans v. Louisiana, supra.* See, *Atascadero, supra*, 473 U.S. at 304, 105 S.Ct. at 3179 (Stevens, dissenting).

The petitioners nearly five years ago sought the protection of a federal court in order to vindicate their rights under federal law. The petitioners did so with reasonable expectations, based upon then prevalent understandings of Eleventh Amendment limitations on federal court jurisdiction, namely, that a federal court would hear their claims, determine what their federal rights are, and afford a remedy, including retroactive payment of unemployment benefits wrongfully withheld in order to remedy past violations of those rights.[11]

That is exactly what has not happened. At every turn, their efforts to vindicate violations of federal law by the respondents have been thwarted by the federal courts below. Notwithstanding the unassailable principle that "[t]he federal courts were created to vindicate the constitution and laws of the United States", *Hanna v. Toner*, 630 F.2d 442, 443 (6th Cir. 1980), cert. denied, 450 U.S. 919, 101 S.Ct. 1365 (1981), the petitioners have been told that, if their federal rights were violated, a federal court is not where they may obtain a remedy. Contrary to the assumption of the *Welch* plurality that the Eleventh Amendment doctrines which have evolved in recent years do not leave aggrieved individuals without a remedy, ___ U.S. at ___, 107 S.Ct at 2953, that is precisely what has happened to three of the named petitioners and the

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[11] As discussed in note 8, *supra*, it is irrelevant that petitioners are aliens. Should this court determine that the Eleventh Amendment was intended to bar only citizen-state and alien-state diversity suits in federal court asserting state law claims against a state, then the Eleventh Amendment is inapplicable to this case. Petitioners assert claims only under federal law.

entire class of thousands of unidentified aliens who reasonably pursued their remedy in federal court rather than state court.

The decision in this case exemplifies the "erratic and irrational results" and the "crazy-quilt pattern" of rules which the *Hans* doctrine has wrought. See, *Welch, supra,* ___ U.S. at ___, 107 S.Ct. at 2970 (Brennan, dissenting). Instead of vindicating the supremacy of federal law, the Tenth Circuit has erected the Eleventh Amendment as an ever expanding constitutional icon which represents an assurance that "States may refuse to follow federal law with impunity". See, *Green v. Mansour, supra,* 474 U.S. at 77, 106 S.Ct. at 430 (Brennan, dissenting).

In recent years, there has emerged an increased awareness that the Eleventh Amendment, rather than having been intended generally to insulate the states from suits brought in federal court by citizens or aliens, had its historical purpose in prohibiting citizen-state and alien-state diversity suits asserting state law claims against a state. See, e.g., authorities cited in *Atascadero, supra,* 473 U.S. at 258 n.11, 105 S.Ct. at 3155 n.11 (Brennan, dissenting).

The Court should review this case in order to examine whether the doctrines of *Hans v. Louisiana* and its progeny are sound in principle and rationale, or whether they "rest on 'misconceived history and misguided logic' ". *Atascadero, supra,* 473 U.S. at 303, 105 S.Ct. at 3178 (Blackmun, dissenting).

CONCLUSION

Based upon the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 24, 1989

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARIA ESPARZA, EUDESIMO ARTEAGA, REYES NUNEZ-ORTEGA, BAHMAN ZANJANI, individually and on behalf of all others similarly situated, DANIEL AGONAFER, JOSE SANDOVAL, and KAZIMIEREZ KOZAK,

Plaintiffs-Appellants,

CONSUELO SANDOVAL,

Applicant for Joinder-Appellant,

v.

RUBEN VALDEZ, Executive Director, Colorado Department of Labor, JOHN KEZER, Director, Division of Employment and Training, INDUSTRIAL COMMISSION OF COLORADO, (Ex-Officio the Unemployment Compensation Commission), in their official capacities,

Defendants-Appellees.

No. 85-2187

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 84-M-1180)

(Filed Nov. 29, 1988)

David F. Steinhoff (Brian Patrick Lawlor with him on the briefs), Colorado Rural Legal Services, Inc., Denver, Colorado, for Plaintiffs-Appellants.

Kathryn J. Aragon, Assistant Attorney General (Duane Woodard, Attorney General; Charles B. Howe, Deputy Attorney General; Richard H. Forman, Solicitor General; Christa D. Taylor, Assistant Attorney General, on the brief), Human Resources Section, State of Colorado, Denver, Colorado, for Defendants-Appellees.

Richard K. Willard, Assistant Attorney General: Thomas W. Hussey, Assistant Director, and Donald E. Keener, Attorney, Office of Immigration Litigation, Department of Justice, Washington, D.C., filed a brief for the United States as Amicus Curiae.

Marcia Egger, New York, New York, filed a brief for the National Employment Law Project as Amicus Curiae.

Daniel A. Stein, Washington, D.C., and William M. Bass, Denver, Colorado, filed a brief for the Federation for American Immigration Reform as Amicus Curiae.

Before LOGAN, McWILLIAMS and TACHA, Circuit Judges.

LOGAN, Circuit Judge.

Four individual aliens who were denied unemployment insurance benefits by Colorado state authorities commenced suit in federal district court seeking declaratory and injunctive relief for themselves and others similarly situated, whom they sought to represent as a class. The individual claims of three other aliens were later joined, and another alien continues to seek joinder. They asserted jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, alleging that state authorities were denying them

their entitlement under federal law, the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §§ 3301-3311, particularly as aliens "permanently residing in the United states under color of law" (the "PRUCOL" provision). *See id.* § 3304(a)(14)(A). The district court deferred the class certification question but heard evidence on a preliminary injunction motion. On the basis of that hearing, the district court denied relief and dismissed the suit.

On appeal, plaintiffs contend that the district court misconstrued the PRUCOL provision of FUTA, erred by failing to consider plaintiffs' other statutory and constitutional claims, erred in not certifying a class, and improperly denied plaintiffs attorney's fees and costs under 42 U.S.C. § 1988. There are other issues, however, that we must consider to properly resolve this appeal.

Understanding the issues in this case requires some consideration of the peculiar FUTA scheme by which the federal and state governments cooperate to provide assistance to unemployed workers. Under FUTA, the federal government helps states fund the costs of administering unemployment compensation programs while leaving most of the actual raising and all of the paying out of benefit monies to the states. *See Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 874-75 (5th Cir. 1987).

To be eligible for federal assistance, a state's unemployment compensation program must comply with certain federal standards. *See* 26 U.S.C. § 3304(a); 42 U.S.C. § 503(a). Of primary importance in the case at bar is 26 U.S.C. § 3304(a)(14)(A), which provides that

> "compensation shall not be payable on the basis of services performed by an alien unless such alien is an

> individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act),. . . ."

Colorado chose to participate in FUTA, and has incorporated § 3304(a)(14)(A) verbatim into its Employment Security Act (CESA), Colo. Rev. Stat. §§ 8-70-101 to 8-82-105, except that it substituted the word "benefits" for "compensation." *See id.* § 8-73-107(7)(a). To be eligible for benefits, a claimant must complete a work base period consisting of at least two consecutive quarters of employment within one year of applying for benefits. *See id.* §§ 8-70-103(1), 8-73-102(1).

Plaintiffs apparently have been employed the requisite amount of time to qualify for unemployment benefits. They all applied to the Colorado Department of Labor for benefits and, on the basis of their alien status, were either turned down or were requested to repay benefits they were granted initially. In lieu of or while filing an appeal permitted them under CESA, *see id.* §§ 8-74-103, – 104, – 107, plaintiffs brought the instant action in federal district court, alleging that they were wrongfully denied rights guaranteed them under FUTA, 42 U.S.C. § 503(a), and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs sought a declaration enforceable against the State of

Colorado that they were entitled to unemployment benefits, and an injunction ordering the state to cease withholding benefits. They also sought the certification of a class consisting of all aliens who, since 1979, wrongfully were denied benefits under 26 U.S.C. § 3304(a)(14), and monetary relief for those aliens. This class was divided into two subclasses, consisting of claimants who, during their work base period, were either "lawfully present for performing services" or "permanently residing under color of law."

The district court explicitly addressed only the PRUCOL claim, characterizing plaintiffs' contention for a construction of the identical FUTA and Colorado statutory sections as one that entitled any alien to benefits "whose presence in the United states is known to the INS [Immigration and Naturalization Service] and that agency has acquiesced in the continued residence of the worker by some action or inaction." *Esparza v. Valdez*, 612 F. Supp. 241, 243 (D. Colo. 1985). The district court disagreed with this construction, and viewed the statutes as permitting payment of unemployment benefits only to those aliens to whom the INS had granted an immigration status allowing them "to remain in the United States for an indefinite period of time." *Id.* at 244. The district court's construction apparently would require individual consideration of each alien's status, first by the INS, which would have to grant the alien a right to remain in the United States for an indefinite period of time, and then by Colorado officials, who would have to find that the alien satisfied employment status and history requirements entitling them to benefits. *See id.*

The district court dismissed plaintiffs' claims because none had shown that a state administrative tribunal had denied unemployment benefits to any individual alien during a period the alien had held an INS "indefinite stay" status. The court evidently concluded that this individualized consideration precluded class representation. The district court entered a final judgment dismissing all plaintiffs' claims without prejudice, leaving them free to pursue their individual claims on the merits before the INS and the state agency. The court did not address the "lawfully present for performing services" provision of § 3304(a)(14)(A), nor was that provision seriously urged upon the court as a basis for plaintiffs' eligibility. The plaintiffs' request for attorney's fees was denied and their other statutory and constitutional claims were not addressed.

While this action was being prosecuted in federal court, three of the plaintiffs were pursuing simultaneous appeals of the denial of their benefits in the Colorado state court system. Ultimately, the Colorado Supreme Court ruled in favor of all three plaintiffs, finding that they fit within the PRUCOL exception to the prohibition on alien benefits. *See Industrial Comm'n v. Arteaga*, 735 P.2d 473 (Colo. 1987); *Division of Employment and Training v. Turynski*, 735 P.2d 469 (Colo. 1987). Subsequently, two other plaintiffs were granted relief by the state because of state administrative appeals they had pending at the time the *Arteaga* and *Turynski* decisions were announced.

Noting the Colorado Supreme Court decisions, this court issued an order to the parties to show cause why the entire appeal should not be dismissed as moot or because of the preclusive effect of the Colorado decisions.

Responding, the state argued for dismissal on the basis that those who appealed in state court had obtained essentially the relief they sought and no longer had a justiciable claim, and that the others' failure to pursue state appeals should preclude prosecution of a § 1983 claim. The United States as amicus curiae argued that the case was not moot because the district court opinion was a declaratory judgment on the meaning of the PRUCOL provision of FUTA, not an adjudication of individual claims. It also asserted that we should not vacate the earlier district court opinion, which it asserts correctly interprets the PRUCOL provision, because of later incorrect state court opinions that put the state on a collision course with federal authorities.[1] Plaintiffs argue that the cause is not moot because some plaintiffs have not been given relief and the others may still serve as class representatives. They also assert that federal common law principles and certain provisions of CESA prohibit our giving preclusive effect to the state court decisions.

In their complaint, plaintiffs request both prospective relief, in the form of a declaration and injunction prohibiting the state from future violations of federal law, and retrospective relief, embodying claims for accrued benefits wrongfully withheld. We deal first with the claim for prospective relief.

[1] The brief for the United States was prepared by the Office of Immigration Litigation, Department of Justice. Curiously, the Department of Labor remains silent in this dispute.

I

An established principle of federal jurisprudence is that "an actual controversy must exist at all stages of appellate review, not merely at the time the complaint is filed." *Honig v. Doe*, 108 S. Ct. 592, 607 (1988) (Rehnquist, C.J., concurring). Jurisdiction over plaintiffs' claims for future relief is appropriate only if a "reasonable likelihood" exists that plaintiffs or other aliens they seek to represent will again be subjected to denials of benefits based on an eligibility interpretation of the unemployment statute different from that which they assert as correct. *See id.* at 601 (majority opinion). In the period since the district court's decision in this case, there have been several major developments that we believe preclude the reasonable likelihood of a reoccurrence of the complained-of interpretation. Therefore we dismiss as moot the claims for prospective declaratory and injunctive relief.

First we point to the Colorado Supreme Court's decisions in *Arteaga* and *Turynski*. Without expressing an opinion on the correctness of their interpretation of the PRUCOL provision, we note that the Colorado Supreme Court reads the provision more expansively than did the district court in the decision before us for review. The district court apparently would require alien claimants to have been granted express or formal "indefinite stay" status by the INS. The Colorado Supreme Court granted unemployment compensation to aliens who did not hold such status.

In *Arteaga*, aliens married to American citizens had applied for permanent status on the basis of that marriage, and, pursuant to its practice of not deporting during the pendency of such cases, the INS had permitted the aliens to work. The Colorado Supreme court found these aliens qualified for benefits under the PRUCOL provision. In *Turynski*, the court made the same finding when deportation proceedings were stayed against applicants for political asylum, basing the ruling on the Attorney General's grant of "extended voluntary departure" to a class of aliens that included the claimants, and because these aliens had received INS work authorization for the relevant periods. Thus, these decisions gave unemployment benefits under PRUCOL to aliens who did not have individualized formal grants of an "indefinite stay" status by the INS, but who had been authorized to work.

At most, plaintiffs in the present case seek a declaration that an otherwise eligible alien claimant qualifies under PRUCOL whenever the INS knows of the alien's presence in the United States and, by either action or inaction, has acquiesced in his continued presence. We believe the Colorado decisions have adopted such an interpretation; at least they clearly have adopted a standard that would provide relief to many more of the individual and class plaintiffs than under the district court's standard.

Further, in 1985 Colorado amended CESA to provide a definition of the PRUCOL provision that would cover

some of these claims.[2] While the amendment arguably restricts the PRUCOL provision interpretation of *Arteaga*

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[2] That provision provides as follows:

"(7)(a) Benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, or was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed. For purposes of the 'Colorado Employment Security Act,' 'permanent resident under color of law' shall mean:

(I) An alien admitted as a refugee under section 207 of the 'Immigration and Nationality Act', 8 U.S.C. § 1157, in effect after March 31, 1980;

(II) An alien granted asylum by the attorney general of the United States under section 208 of the 'Immigration and Nationality Act', 8 U.S.C. § 1158;

(III) An alien granted a parole into the United States for an indefinite period under section 212(d)(5)(B) of the 'Immigration and Nationality Act', 8 U.S.C. § 1182(d)(5)(B);

(IV) An alien granted the status as a conditional entrant refugee under section 203(a)(7) of the 'Immigration and Nationality Act', 8 U.S.C. § 1153(a)(7), in effect prior to March 31, 1980;

(V) An alien who entered the United States prior to June 30, 1948, and who is eligible for lawful permanent residence pursuant to section 249 of the 'Immigration and Nationality Act', 8 U.S.C. § 1259; or

(VI) An alien who has been formally granted deferred action or nonpriority status by the immigration and naturalization service."

Colo. Rev. Stat. § 8-73-107(7)(a).

and *Turynski*, the Colorado Court of Appeals has construed it to have no such effect. *See Sandoval v. Colorado Div. of Employment*, 757 P.2d 1105 (Colo. Ct. App. 1988), *cert. denied*, Colo. Sup. Ct., Oct. 17, 1988. The *Sandoval* court afforded relief under the statute even to an alien who lacked work authorization but who had a petition for adjustment of status pending during his work base period.

Even if the Colorado decisions would not grant the prospective relief sought by all individual plaintiffs and members of the class sought to be certified, two additional intervening developments together serve to render this controversy moot. First, in § 274A(a)(1) of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a(a)(1), Congress made it unlawful for an employer to hire an alien who lacks INS work authorization or other formal government authorization. Thus, plaintiffs appear to be foreclosed from seeking relief for aliens lacking such authorization.[3]

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[3] We are uncertain whether plaintiffs seek relief for aliens not having work permits. At one place in the record plaintiffs' counsel stated that his clients "do not contend . . . that [INS] employment authorization is required or needed to be found under color of law or to be eligible for unemployment benefits." IV R. 5. But counsel had earlier acknowledged that each plaintiff did have such authorization. *Id.* at 4. And from the record it appears the INS routinely grants work authorization to all of those who have a request for permanent status pending, and, under some plausible theory, are eligible for such status. Further, to be eligible for unemployment insurance benefits a claimant must be available for work, which for an alien means having valid authorization to work from the INS. *See* DOL Letter No. 1-86, *supra*, § 4(a)(2).

Second, to the extent aliens have work authorization during their base period and at the time benefits are claimed, the Department of Labor (DOL) has issued an opinion letter directing state agencies to grant them benefits if they are otherwise eligible. Unemployment Insurance Program Letter No. 1-86, 51 Fed. Reg. 29,713 (1986) [hereinafter DOL Letter No. 1-86]. In that letter, the DOL adopted an interpretation of the PRUCOL provision very similar to that of the district court. *Id.* § 4(d). However, it interpreted the "lawfully present for purposes of performing services" provision of FUTA § 3304(a)(14)(A) to encompass "aliens who are permitted to work by the INS regardless of their status in the United States." DOL Letter No. 1-86, *supra*, § 4(c)(3). Thus, the individual and class plaintiffs will now receive the relief they seek, although possibly under a different clause in FUTA § 3304(a)(14)(A). If Colorado officials were to ignore this directive, an alien claimant would have recourse to the Colorado courts. There, an appellate court already has relied on DOL Letter No. 1-86 in granting benefits to an alien that a state agency had found ineligible under the PRUCOL provision. *See Bushehri v. Industrial Claims Appeals Office*, 749 P.2d 439 (Colo. Ct. App.), *cert. denied*, (Colo. Sup. Ct., Oct. 8, 1987).

It is true, of course, that the political winds on the sea of federal agency interpretation could blow in a different direction at a future date, making further interpretation of the PRUCOL provision necessary, but that possibility is too speculative and remote to bring this case within any exception to the traditional mootness doctrine. *See Honig*, 106 S. Ct. at 601; *Murphy v. Hunt*, 455 U.S. 478, 482

(1982). Therefore we dismiss plaintiffs' claims for prospective relief as moot.

II

Plaintiffs also seek the payment of past unemployment benefits that they assert were wrongfully withheld. The claims of those who pursued their appeals in the state system and were awarded relief as a result of the *Arteaga* and *Turynski* opinions are moot, of course. But we must consider the claims of those plaintiffs and members of the putative class who chose not to appeal in the state courts.[4]

We have significant Eleventh Amendment concerns here because plaintiffs seek a judgment for direct payments from a state-administered fund for past violation of alleged federal rights.[5] Because each claimant would

[4] These claims also might be moot if the aliens were permitted to have their claims reexamined by the state under the revised eligibility standards discussed above. CESA imposes a "good cause" limitation, however, on the reopening of claims not appealed within a certain time, *see* Colo. Rev. Stat. § 8-74-106, and even were this not a bar to reexamination, it is unclear whether the Colorado courts and agencies would apply eligibility standards other than those that existed at the time the claims were filed. *See Arteaga*, 735 P.2d at 477 n.7 (DOL Letter No. 1-86 would not be applied because it was not in effect at time claims arose). Thus, we do not regard these claims as moot.

[5] All defendants have been sued in their official capacities, which is the same as if the state itself had been sued. *See Eastwood v. Department of Corrections*, 846 F.2d 627, 632 (10th Cir. 1988).

have to establish rights under other eligibility criteria, which we assume would be in state proceedings, the complaint also apparently seeks a declaratory judgment, binding in those state proceedings, that these officials have improperly construed the federal FUTA statute.

The defendants have raised no Eleventh Amendment defense, and we face a threshold question whether we can or should consider the issue. The Supreme Court appears never to have decided precisely whether a court can or should raise Eleventh Amendment jurisdictional issues sua sponte. Because the state can waive the Eleventh Amendment defense, the Supreme Court has "never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion." *Patsy v. Board of Regents*, 457 U.S. 496, 516 n.19 (1982). Nevertheless, the Court in *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974), considered the Eleventh Amendment defense sufficiently like a jurisdictional issue to permit it to be raised for the first time on appeal. And in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984), the Court at least inferred that sua sponte consideration is necessary when it stated that no basis of jurisdiction can override the Eleventh Amendment, and that "[a] federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." Other recent circuit decisions have held that the court of appeals may raise the Eleventh Amendment issue sua sponte. *E.g., Estate of Ritter v. University of Michigan*, 851 F.2d 846, 851 (6th Cir. 1988); *Demery v. Kupperman*, 735 F.2d 1139, 1149 n.8 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985). We conclude that

we should follow these circuits, and therefore we will consider the Eleventh Amendment issues in this case.

Insofar as we are being asked for a declaration that state officers' past action in interpreting FUTA (or the state's identical section) was in violation of federal rights, the Supreme Court, in *Green v. Mansour*, 474 U.S. 64, 73 (1985), stated as follows:

> "We think that the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's [a state officer's] action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment."

An award of damages to be paid *directly* out of state funds for federal law violations also is prohibited generally by the Eleventh Amendment. *Edelman*, 415 U.S. at 663. But some district courts and one circuit have allowed plaintiffs to sue a state in federal court for recovery of past unemployment claims, principally on the grounds that the state's unemployment compensation fund is a special, segregated fund as distinguished from a general revenue fund. *See Brown v. Porcher*, 660 F.2d 1001, 1007 (4th Cir. 1981), *cert. denied*, 459 U.S. 1150 (1983), *overruled on other grounds, Wimberly v. Labor & Indus. Relations Comm'n*, 479 U.S. 511 (1987). The validity of this distinction has been questioned by three Justices dissenting from the denial of certiorari in that case. *See Porcher v.*

Brown, 459 U.S. 1150, 1153 (1983) (White, J., joined by Powell & Rehnquist, JJ., dissenting from denial of certiorari). We have great difficulty with the distinctions drawn by the Fourth Circuit and the district courts on which it relies, especially considering the similarity between the unemployment compensation scheme under FUTA, and the federal-state program at issue in *Edelman*. The program in *Edelman* concerned aid to the aged, blind or disabled; it was administered pursuant to federal regulations, and involved monies in the state treasury that came in part from the federal government. *See also Rothstein v. Wyman*, 467 F.2d 226, 236-38 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973).

We do not believe that a state's sovereign immunity from suits for past damages can be abrogated through reliance on notions of whether such relief would be paid out of a general or special revenue fund. Either way, an injunction ordering retroactive benefits effectively would be "an award of money damages for past violations of federal law" that is precluded by the Eleventh Amendment. *Green*, 474 U.S. at 69-70 (citing *Edelman*, 451 U.S. at 666-69).

The Supreme Court has rejected the notion that an award of damages out of a state fund is constitutional when the fund has been segregated for a special purpose. In *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946), and *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944), taxpayers sued state officials attempting to recover taxes paid under protest where the money was segregated and held in trust pending determination of the taxpayers' rights. In both cases, the Court held that the suits effectively were against the state and, thus,

barred by the Eleventh Amendment. *Kennecott*, 327 U.S. at 576-77; *Great N. Life*, 322 U.S. at 53. The Court observed that the statute at issue in *Great Northern* providing for the special segregation of tax funds was very similar to a statute involved in a case where the Eleventh Amendment was held to bar suit "except for the *immaterial difference* that the money collected is directed to be held separate and apart by the collector instead of being held in the general funds of the State Treasurer." *Id.* at 53 (citing *Smith v. Reeves*, 178 U.S. 436 (1900)) (emphasis added).

The Fourth Circuit apparently thought it significant that the money paid into the state unemployment fund was separately financed by "employer contributions, federal funding, investment income, and other receipts," and that the state was insulated from liability for amounts exceeding the resources of the fund. *See Brown*, 660 F.2d at 1007. These also are features of the Colorado Unemployment Compensation Fund. But it seems illogical to base a state's immunity on whether it raises certain revenue by taxing its individual residents, employers, businesses, or products. Immunity should not depend on which aspect of the state's tax base it seeks to utilize. And the Supreme Court already has rejected the notion that a state waives its immunity merely by receiving federal assistance. *See Edelman*, 415 U.S. at 673.[6]

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[6] If Colorado did not participate in FUTA, it might fund its own program through general revenues. In such a case no argument could be made that an award of damages would be permitted by the Eleventh Amendment. The Fourth Circuit in effect holds that by mere participation in a federal program that mandates a special fund, the state has waived its Eleventh Amendment immunity.

Finally, even if we could find little or no fiscal impact on the state from plaintiffs' suits, the financial impact on the state does not appear to be the predominant factor in Eleventh Amendment analysis. The Supreme Court instead focuses on the basic recognition that when money damages are awarded against the state, the state as an entity is being subjected to suit. As the Supreme Court has stated, a retroactive award of monetary relief

> "will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials."

Id. at 668; *see also Papasan v. Allain*, 478 U.S. 265, 278 (1986). Thus, no matter what fund a judgment for past damages comes from, it is still a damage award against the state. We hold that relief such as that claimed by the plaintiffs is barred by the Eleventh Amendment.

Although we have reasoned differently than the district court, we have reached the same conclusion. Because plaintiffs received no relief on the merits of their claims as a result of this suit, they are not prevailing parties within the meaning of 42 U.S.C. § 1988 and are not entitled to attorney's fees. *See Rhodes v. Stewart*, 109 S. Ct. 202 (1988) (per curiam); *Hewitt v. Helms*, 107 S. Ct. 2672 (1987). The order dismissing plaintiffs' action is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-1180

MARIA ESPARZA, EUDESIMO ARTEAGA, REYES NUNEZ-ORTEGA, and BAHMAN ZANJANI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

RUBEN VALDEZ, Executive Director, Colorado Department of Labor; JOHN KEZER, Director, Division of Employment and Training, and INDUSTRIAL COMMISSION OF COLORADO, (Ex-Officio the Unemployment Compensation Commission), in their official capacities,

Defendants.

MEMORANDUM OPINION AND ORDER
(Filed June 25, 1985)

The plaintiffs in this civil action are citizens of countries other than the United States. They claim that the Colorado Department of Labor has illegally denied and requested repayment of unemployment insurance benefits to which they are entitled under federal law. The plaintiffs seek declaratory and injunctive relief for themselves and for others similarly situated. The plaintiffs filed a motion for class certification pursuant to F.R.Civ.P. 23(a) and (b)(2), and they moved for a preliminary injunction. The class certification question was deferred and the preliminary injunction motion was heard on December 6, 1984, at which time evidence was taken. Following the hearing, the plaintiffs moved for final determination of the issues on the basis of that hearing. The parties have

filed extensive briefs, and the United States Immigration and Naturalization Service ("INS") was granted leave to file a brief amicus curiae.

The unemployment compensation program is a cooperative federal-state effort to provide financial assistance for unemployed workers. 42 U.S.C. §§ 501-504 (1983) provides for federal funding for unemployment compensation programs with certain requirements for states to be eligible for such funding. 26 U.S.C. §§ 3301-3311 (1979 and 1984 supp.) imposes a duty on states to tax employers at prescribed rates to establish a fund for the payment of benefits to eligible workers. In 1976, Congress amended the Federal Unemployment Tax Act ("FUTA") by adding subsection (a)(14) to 26 U.S.C. § 3304. That new subsection directed the states to include laws forbidding the payment of unemployment compensation to aliens unless the alien met certain immigration status requirements. The federal statute now reads as follows:

> compensation shall not be payable on the basis of service performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time such services were performed, was lawfully present for purposes of performing such services or *was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act.)*

26 U.S.C. § 3304(a)(14) (emphasis added).

The central issue in this case is the legal interpretation to be given to the underscored language which is

common to both the state and federal statutes. The plaintiffs contend that the language and legislative history support the conclusion that entitlement to benefits may be earned by any aliens whose presence in the United states is known to the INS and that agency has acquiesced in the continued residence of the worker by some action or inaction. The INS, in its amicus brief, urges a very restrictive interpretation, limiting the category to aliens who have a lawful immigration *status* – conditional entrants, refugees and certain parolees. Essentially, coverage would be provided only to those who fall within the explanatory parenthetical in the statute. The defendants agree with the INS' position but also recognize that "color of law" is an indefinite phrase often used to permit consideration of individual circumstances. Accordingly, the defendants make the following suggestion at page 15 of their brief:

> The broadest possible construction which could be given to this phrase consistent with legislative intent and case law, would make eligible those aliens who, after review of their particular factual circumstances pursuant to a specific statutory or regulatory procedure, have been granted an immigration status which allows them to remain in the United States for an indefinite period of time.

That suggested construction is consistent with the language of the act, the legislative history, and the complexity of the policy considerations involved. The determination of what persons shall be admitted to the United States for what purposes are matters which are fundamental questions of national sovereignty, and these are peculiarly questions of federal law. The Congress has enacted a complex set of statutes on the subject and has

created the INS as an agency with broad powers, both regulatory and adjudicatory. The Supreme Court has recently recognized the importance of giving due deference to the INS in alien matters. *Immigration and Naturalization Service v. Rios-Pineda*, 53 U.S.L.W. 4537, 4539 (U.S. May 13, 1985). What appears clear to this court is that in amending FUTA, Congress recognized the many ways in which an alien may have some status to continue indefinite residence in the United States as a result of statute, regulation or adjudicative proceedings, where that status does not fall within some classification which could be the basis for statutory reference in defining the exclusion from coverage for unemployment benefits.

The case emphasized by the plaintiffs is illustrative of the point. *Holley v. Lavine*, 553 F.2d 845 (2d Cir. 1977), *cert denied*, 435 U.S. 947 (1978). There, the INS informed a Canadian citizen with six American citizen children that she would not be deported at least until her children are grown. That discretionary act by the INS gave "color of law" to her status as a resident of the United States.

Adoption of the plaintiffs' position would seriously erode the government's ability to deal with the problem of illegal aliens. It would permit any alien, without regard to the legality of his entry, to obtain a job, make his presence known to the INS by the filing of some application, and, in the absence of deportation, claim that his residence was "under color of law." Congress has not indicated an intention to place such persons into the unemployment compensation benefits program.

Jurisdiction in this case depends upon the plaintiffs' common claim to the broad construction of the statute. If

color of law is given the meaning which plaintiffs urge, then all of the plaintiffs and the class they seek to represent would come within it, and injunctive relief should be granted. The adoption of the state's alternative suggestion gives a different result. While the plaintiffs' claim has presented a case or a controversy requiring interpretation of federal law under 28 U.S.C. § 1331, and presents a claim for relief under 42 U.S.C. § 1983 for the denial by the state officials of benefits to which the plaintiffs claim entitlement under federal law, the court's more limited construction of the statute requires individual consideration of the status of each applicant. That is a matter to be decided under the adjudicative processes provided by statute and regulation. Here none of the plaintiffs have alleged that they have been injured by state officials because of a violation of the federal statute as interpreted by this court, i.e. that a state administrative tribunal, after a review of the factual circumstances of each case, denied unemployment benefits during a period in which plaintiffs held an immigration status which allows them to remain in the United States indefinitely. This court under § 1983 has jurisdiction to review actions of persons operating under color of state law; it has no power to conduct a de novo review of the immigration status of the individual plaintiffs. It is the view of this court that there is no basis for an award of attorney's fees to any party to this action.

Upon the foregoing, it is

ORDERED, that the court declares that the correct construction of the disputed phrase "was permanently residing in the United States under color of law at the time such services were performed (including an alien

who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act," is that the phrase makes eligible those aliens who, after review of their particular factual circumstances pursuant to a specific statutory or regulatory procedure, have been granted an immigration status which allows them to remain in the United States for an indefinite period of time. And it is,

FURTHER ORDERED, that plaintiffs' motions for class certification, for leave to amend the complaint, to supplement the complaint, and to add or join party plaintiff Consuelo Sandoval are denied, and it is

FURTHER ORDERED, that determinations of eligibility are individual adjudicative decisions which must be made pursuant to the established processes which do not involve this court, and that, therefore, the individual claims for injunctive relief are denied, without prejudice to the merits of their claims, and it is

FURTHER ORDERED, that the Clerk of this court shall forthwith enter a final judgment as a declaratory judgment interpreting the subject statute, and dismissing the plaintiffs' claims without prejudice.

Dated: June 25th, 1985

BY THE COURT:

/s/ Richard P. Matsch
Richard P. Matsch, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-1180

MARIA ESPARZA, EUDESIMO ARTEAGA, REYES NUNEZ-ORTEGA, and BAHMAN ZANJANI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

RUBEN VALDEZ, Executive Director, Colorado Department of Labor; JOHN KEZER, Director, Division of Employment and Training, and INDUSTRIAL COMMISSION OF COLORADO, (Ex-Officio the Unemployment Compensation Commission), in their official capacities,

Defendants.

AMENDED JUDGMENT
(Filed July 5, 1985)

Pursuant to the Memorandum Opinion and Order, signed by the Honorable Richard P. Matsch, United States District Judge, and entered on June 25, 1985, and the Order Amending Order and Judgment, entered July 5, 1985, it is

ORDERED, that the correct construction of the phrase "was permanently residing in the United States under color of law at the time such services were performed (including an alien who was lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act," in 26 U.S.C. § 3304(a)(14), is that the phrase makes eligible those

aliens who, after review of their particular factual circumstances pursuant to specific statutory, regulatory or adjudicative proceedings, have been granted an immigration status which allows them to remain in the United states for an indefinite period of time, and it is

FURTHER ORDERED, that the plaintiffs' individual claims for relief are dismissed without prejudice and without the award of costs or attorney's fees to any party.

DATED at Denver, Colorado, this 5th day of July, 1985.

APPROVED:

/s/ Richard P. Matsch
Richard P. Matsch,
Judge

FOR THE COURT:
JAMES R. MANSPEAKER,
CLERK

By: Stephen P. Ehrlich
Stephen P. Ehrlich,
Chief Deputy

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER 30, 1988

Before Honorable James K. Logan, Honorable Robert H. McWilliams and Honorable Deanell R. Tacha, Circuit Judges.

MARIA ESPARZA, EUDESIMO ARTEAGA, REYES NUNEZ-ORTEGA, BAHMAN ZANJANI, individually and on behalf of all others similarly situated, DANIEL AGONAFER, JOSE SANDOVAL, and KAZIMIEREZ KOZAK, Plaintiffs-Appellants, CONSUELO SANDOVAL, Applicant for Joinder in Class Action-Appellant, v. RUBEN VALDEZ, Executive Director, Colorado Department of Labor; JOHN KEZER, Director, Division of Employment and Training, and INDUSTRIAL COMMISSION OF COLORADO, (Ex-Officio the Unemployment Compensation Commission), in their official capacities, Defendants-Appellees, NATIONAL EMPLOYMENT LAW PROJECT, FEDERATION FOR AMERICAN IMMIGRATION REFORM, UNITED STATES OF AMERICA, Amici Curiae,	*JUDGMENT* No. 85-2187 (D.C. #84-M-1180)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk